SUPREME COURT OF THE UNITED STATES.

No. 497.

MARSHALL LOWE, JOHN JEROME GRAY and ALFRED TAYLOR,

Petitioners and Appellants,

against

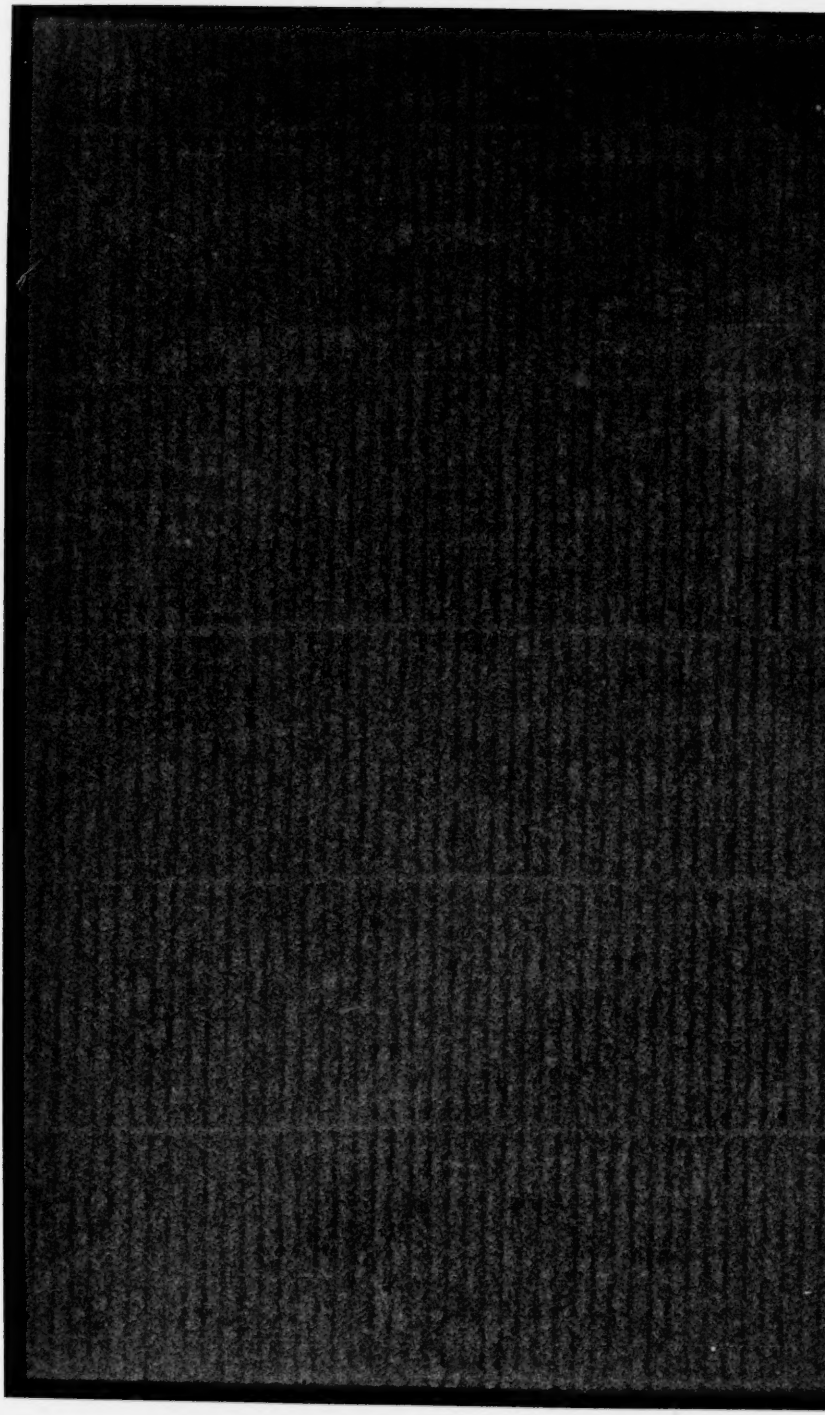
EDWARD T. O'DEA,

Respondent.

Brief for Appellants.

BUTLER, NORMAN, JOLINE & MYERSE,

Proctors for Petitioners, Appellants.



Supreme Court of the United States.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR, *Libellants and Appellants,* *against* EDWARD E. O'BRIEN, *Respondent.*	No. 266, October Term, 1896.

BRIEF FOR LIBELLANTS AND APPELLANTS.

This action comes before this Court under a writ of *certiorari* issued May 7th 1895 to the Judges of the United States Circuit Court of Appeals for the Second Circuit *(Record p. 66)*.

The action was originally instituted in the District Court of the United States for the Southern District of New York, by the libellants, composing the firm of Gibbs & Company, of Valparaiso, Chili, owners of a shipment of nitrate of soda, against the respondent as owner of the ship *Andrew Johnson*, to enforce contribution to expenses incurred in Callao, Peru, which expenses had been paid by the libellants through a bottomry and respondentia bond affecting their cargo.

Statement of Facts.

In June and July, 1884, the libellants shipped on board the *Andrew Johnson*, at Iquique Bay, 10,399 bags of nitrate of soda, and at Caleta Buena 9,544 bags of nitrate of soda, to

be transported by said vessel to Hamburg, Germany, and there to be delivered to the order of Antony Gibbs & Sons, of London *(Exhibits 1, 2 and 3, pp. 18, 19)*.

On the 15th of July the ship sailed with all this cargo from her last loading port, Caleta Buena, for Hamburg, and soon thereafter met with heavy weather and with disaster, and necessarily sought a port of refuge *(Killeran, p. 16)*.

She went into Callao, and her condition was such that she could not prudently continue her voyage without repairs *(Answer, p. 12; Killeran, p. 16)*.

A survey was held August 4th, by which it was found that certain butts and seams at the water's edge were very soft, and that water had entered in considerable quantities from the top sides, though she was making comparatively little water while lying in port. The surveyors recommended that she be lightened of cargo until her upper sheets of metal were out of water for further examination *(First Survey, Ex. 4, pp. 19, 20)*.

After the vessel had been lightened by the discharge of 900 tons of cargo she was further examined August 24th. The surveyors recommended that the top sides and water ways be horsed and caulked and the main decks caulked from foremast forward, the hood ends carefully overhauled, re-fastened where necessary and well caulked. They further recommended that at least 1,200 tons of the cargo be forwarded in another bottom, and reported that with the above repairs and thus lightened the *Andrew Johnson* could proceed on her voyage with safety. This they said they considered to be in the interest of both the owners of ship and cargo *(Second Survey, Ex. 5, pp. 20, 21)*.

The final survey was held September 10th. in which the surveyors reported that the repairs ordered by them had been well executed, the top sides had been horsed and caulked, the several hood ends re-fastened, the main deck forward re-caulked and two new bilge pumps supplied; that the cargo remaining on board had been well stowed and carefully distributed, and that the vessel was making no water *(Third Survey, Ex. 6, p. 22)*.

The master of the *Andrew Johnson*, in accordance with the recommendations of the second survey, shipped 8,449 bags of his cargo, weighing about 1,130 tons, upon another vessel, the *Mary J. Leslie (Killeran, p. 17)*.

This shipment was made in the name of J. H. Killeran as master, and the bill of lading bore the following endorsement signed W. H. McLeod, master of the *Mary J. Leslie :*

" The 8,449 bags of nitrate of soda as per this bill of lading " are included in and jointly responsible with the nitrate of " soda specified in the bottomry and respondentia bond given " to Messrs. Grace Bros. & Co. as security for payment of the " American ship *Andrew Johnson's* disbursements in Callao."
Ex. 7, p. 17 ; Ex. B, p. 11.

For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment and stowage of cargo, the master incurred serious expenses *(Amended Libel, p. 5 ; Answer, p. 12 ; Bond, p. 9).*

The vouchers for these expenses have been proved and show an aggregate of 13,237.72 Peruvian soles, equivalent to £2,212, 5, 9 *(Vouchers, p. 18 ; Answer, p. 12).*

In order to raise funds to meet these expenses the master made a bottomry and respondentia bond in favor of Grace Brothers & Co., bearing date September 15th, 1884, for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599, 8, 9 *(Killeran, p. 17 ; Bond, pp. 8–10)* or about $12,500. Grace Bros. & Co. appear to have been general agents for the respondent, though there is no proof that they advanced upon the bottomry bond as agents *(Ex. 3, p. 19 ; O'Brien, p. 23).*

For the payment of the bond the master bound, obligated and hypothecated the *Andrew Johnson* and her cargo " includ- " ing that portion of the cargo transhipped to the *Mary J.* " *Leslie*," and the freight *(Bond, p. 9).*

The payment was conditioned that the vessel should set sail from Callao and proceed to Hamburg and pay the bond within five days after arrival at her final port of destination and " before commencing to discharge the cargo," free of any average, and with the provision that, if during the voyage there should be " *an utter loss* " of said vessel, the bond should be void, and otherwise be and remain in full force and virtue *(Bond, p. 10).*

Thereupon the two vessels, the *Andrew Johnson* and the *Mary J. Leslie*, sailed from Callao for Hamburg carrying their respective lots of cargo.

The value of the *Andrew Johnson* was about $60,000, the value of her freight was $20,000, and the value of the cargo remaining on board of her about $50,000. The value of the cargo transshipped to the *Mary J. Leslie* was about $40,000.

The *Andrew Johnson* met collision with the British ship *Thirlmere* and was sunk in mid-ocean *(Killeran, p. 18)*.

The *Mary J. Leslie* arrived in regular course at Hamburg on February 5th, 1885 *(Wirtz, p. 30)*. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg *(Wirtz, p. 30)*.

On the 10th of February formal demand was made upon Mr. Wirtz for the payment of the bond by Herman Stockfleth, notary, acting on behalf of Berenberg, Gossler & Co., bankers *(Stockfleth, p. 30; Wirtz, p. 30)*.

Berenberg, Gossler & Co. represented Baring Brothers & Co. of London, who in turn represented the owners of the bond *(Sillem, p. 26; Wirtz, p. 30)*.

No cargo had up to the time of formal demand been discharged from the *Mary J. Leslie*, and by the terms of the bond and under the provisions of the German law it could not be discharged until the bond was paid or payment secured *(Bond, p. 10; German Commercial Code, Article 695, p. 37)*.

On the 11th of February, in order to secure the release of the cargo, Antony Gibbs & Sons gave the following obligation to Baring Brothers & Co.:

"In consideration of your telegraphing Messrs. J. Beren-
"berg, Gossler & Co., Hamburg, to withdraw their claim on
"your behalf in respect of bottomry and respondentia on the
"cargo of nitrate of soda to our order arrived by the British
"vessel *Mary J. Leslie*, we hereby engage to pay you whatever
"proportion of the said bottomry and respondentia bond may
"be found to be legally due from the said cargo, the question
"to be submitted to Messrs. Waltons, Bubb & Waltons and
"Messrs. William Richards & Son in London, or if it be found
"to be governed by Hamburg law, to equally competent au-
"thorities there to be appointed by your agents and ours"
(Sillem, p. 26; Ex. A, pp. 26, 27).

This engagement of Antony Gibbs & Sons was accepted the same day by Baring Brothers & Co., as follows:

"With reference to your letter of this date we understand
"your guaranty to be equally binding should the case be de-

" cided to be governed by Hamburg law, and shall accordingly " telegraph our friends in Hamburg to release the cargo of the " *Mary J. Leslie.*"

Sillem, p. 26 ; Exhibit B, p. 27.

Thereupon the discharge of the cargo was commenced and was completed February 27th (*Wirtz, p. 31*).

In order to determine the amount legally due to the bond-holders from that portion of the cargo transported on the *Mary J. Leslie* Berenberg, Gossler & Co. and Hugo Wirtz, representing respectively Baring Brothers & Co. and Antony Gibbs & Sons, appointed Dr. Wolffson and Dr. Stammann, " eminent and leading lawyers of Hamburg " ; and these gentlemen, after full consideration, decided that the cargo on board the *Mary J. Leslie* was liable to the extent of its value for the whole of the bond *(Sillem, p. 26 ; Wirtz, p. 30).*

The value of that portion of the cargo was about $40,000, and therefore far in excess of the amount of the bond *(Wirtz, p. 31).*

Dr. Stammann and Dr. Wolffson gave their opinion March 14th *(Record, p. 33)* as follows :

" HAMBURG, 14 March, 1885.

" HUGO WIRTZ, ESQRE.

" MESSRS. J. BERENBERG, GOSSLER & CO.

" We formulate the question which you, in the names of " Messrs. Antony Gibbs & Sons and Messrs. Baring Brothers " & Co. have submitted to our judgment, as follows :

" ' Whether the portion of the cargo of nitrate of soda of the " ' *Andrew Johnson* brought home per *Mary J. Leslie* is liable " ' for the whole amount of the bottomry bond which was " ' signed in Callao, and whether, consequently, the receiver of " ' this portion of the cargo has to pay the whole of the bot- " ' tomry bond, provided the value of this portion of the cargo " ' is not less than the amount of the bottomry debt ?

" This question we must answer in the affirmative, because " according to the law here, ship, freight and cargo of the " *Andrew Johnson*, as well as the portion of the cargo which " was transhipped into the *Mary J. Leslie* are jointly liable " for the whole amount raised on bottomry at Callao, and, " therefore the *Andrew Johnson* and her cargo having become " a total loss, the holder of the bottomry bond can come upon

" that portion of the cagro which was shipped by the *Mary J.*
" *Leslie* for the whole amount of his claim.

" Some doubt might be raised as to whether, according to
" the wording of the bottomry bond, the money was not lent,
" or appear to be lent contingent upon the safety of the *An-*
" *drew Johnson*, and becoming due only after her arrival at her
" port of destination; but becoming null and void in the event
" of her non-arrival. We are of opinion, however, that this in-
" terpretation is not consistent with the real intention of the
" contracting parties, and that the wording referred to has
" originated in the not sufficiently careful use and employment
" of a form of bond which happened to be at hand. This
" seems the less doubtful to us for this reason, that if the
" bottomry bond were interpreted in this manner the cargo of
" the *Mary J. Leslie* would be entirely liberated after the loss
" of the *Andrew Johnson* occurred, and would not even bear a
" portion of the bottomry debt, which, nevertheless, has
" arisen out of a case of general average. Manifestly this
" cannot have been the intention of the parties interested.

" Yours truly,
" J. Otto Stammann.
" J. Wolffson."

The result was at once communicated to London, and on March 17th, 1885, Antony Gibbs & Sons paid to Baring Brothers & Co. the full sum of £2,592, 7, 9 *(Sillem, p. 26)*.

Suit was brought by the owners of the *Andrew Johnson* against the owners of the *Thirlmere* in England to recover damages for the loss of his vessel by collision, valuing the vessel at $60,000 *(O'Brien, pp. 23, 24)*. The owners of the *Thirlmere* limited their liability under the provisions of the British Act to £8-0 Sterling per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the *Andrew Johnson* received £5,179, 13, 6 on account of the loss of his ship and £858, 6, 11 on account of her freight *(O'Brien, p. 24)*. The libellants herein recovered in that proceeding in respect to that portion of their cargo which sank with the *Andrew Johnson (Record, p. 58)*.

After the payment of the bond by the libellants in Hamburg they caused an adjustment to be made in London by William Richards & Sons, average adjusters to show what portion of the expenses covered by the bond were properly chargeable against the owner of the *Andrew Johnson* either as gen-

eral or special charges, and what portion against the owners of the cargo *(Richards, pp. 27, 28)*.

Then and in July, 1887, this action was instituted by the libellants, claiming to recover from the owner of the *Andrew Johnson* the share of general and special charges properly falling upon the vessel, and which had been paid by the funds raised on bottomry.

In that libel it was alleged, though an error of the pleader, that the *Andrew Johnson* and her freight had become a total loss.

Exceptions were filed to the sufficiency of the libel, and argument was had thereon in April 1888 before the District Judge. Under the general exception that no cause of action was stated, it was urged (1st) that under the peculiar terms of the bond, the bond became void upon the loss of the *Andrew Johnson;* and (2nd) that the liability of the ship owner, being limited to his interest in the vessel and freight, was *nil*.

The District Judge found that the bond was not rendered void, so far as the cargo delivered in Hamburg was concerned, by reason of the loss of the *Andrew Johnson;* but held that the libel stated no cause of action against the ship owner because its allegations showed that vessel and freight had become a total loss, and the ship owner was thereby absolved from liability. *(Opinion, pp. 41-45)*.

Thereupon the libel was amended to set up the necessity of the repairs and to set up the bill of lading issued by the *Mary J. Leslie*. Upon the argument of these exceptions it was again held that a sufficient cause of action was not stated *(Record, p. 2)*.

In January, 1889, the libel was further amended to allege that the funds had been supplied for the bottomry by the respondent *(Record, p. 2)*. Again exceptions were filed, but before the same were brought on for argument the libellants again amended their libel to set up the fact, which had then just become known to the proctors, that the *Andrew Johnson* had not become a total loss at sea but had been sunk by the *Thirlmere*, and that the owner of the *Andrew Johnson* had recovered by legal proceedings against the *Thirlmere* in Great Britain the sum of £6,557, 9, 6 *(Record, p. 2)*.

The libel as so amended is the one upon which the cause was tried in the District Court *(Amended libel, pp. 4-7)*.

The libellants, to maintain their cause of action, presented the depositions of the owner of the *Andrew Johnson (O'Brien, pp. 22-25)*, the master of the *Andrew Johnson (Killeran, pp. 15-18)* and witnesses in London and Hamburg *(Record, pp. 25-40)*.

The respondent called no witnesses in the District Court, but read one deposition of the master of the *Andrew Johnson* which had originally been taken by the libellants *(Killeran, p. 40)*.

The libel was sustained upon the trial *(Opinion, pp. 45-48)*, upon the grounds heretofore noted and upon the further ground that the bottomry lender's lien attached to all salvage *(Opinion, pp. 46, 47)*, and it was ordered that the libellants "recover so much of the moneys paid by them in satisfying "the bottomry and *respondentia* bond referred to in the libel "as upon proper adjustment is properly chargeable to the "owner of the ship *Andrew Johnson* and her freight" *(Interlocutory Decree, p 48)*.

Reference was ordered to a Special Commissioner to ascertain and compute such amount *(Interlocutory Decree, p. 48)*. He found that the libellants were entitled to recover the principal sum of $6,091.73, for which sum, with interest and with costs, a decree aggregating $9,598.94 was entered July 12th, 1894 *(Decree, pp. 55, 56)*.

Upon appeal the United States Circuit Court of Appeals reversed the decree of the District Court and directed that the libel be dismissed upon the stated grounds that the bottomry bond must be construed as falling due only upon the arrival of the *Andrew Johnson* in Hamburg, that the *Andrew Johnson* must be deemed an "utter loss," although the circumstances attending her destruction gave to her owners a valuable right of recovery against the *Thirlmere (Opinion, pp. 58-65; Decree pp. 67, 68)*, and that the payment of the bond by the owners of the cargo in Hamburg was a voluntary payment through which they acquired no rights against the shipowner.

Opinion, pp. 58-65; Decree, pp. 67, 68.

The libellants thereupon filed their petition in this Court for a writ of *certiorari*, which writ was granted May 7th, 1895 *(Record, p. 66)*.

POINTS.

First.

THE BOND WAS ENFORCEABLE IN HAMBURG AGAINST THE PORTION OF THE CARGO WHICH REACHED HAMBURG IN THE MARY J. LESLIE.

The cargo arriving by the *Mary J. Leslie* was originally covered by the bond. The bond itself is explicit. The maker of the bond says:

> " I bind myself, my heirs, executors or administrators, and " also the hull, boats, tackle, apparel and furniture of the said " vessel and her cargo of nitrate of soda, including about " twelve hundred tons of nitrate of soda, transhipped on board " the British bark *Mary J. Leslie*" *(Bond, p. 8)*.

The bond is later described as a

> " present bond or obligation and hypothecation of the said " vessel, her boats and apparel, and her cargo, including that " portion of the cargo transhipped to the *Mary J. Leslie*, and " the freight to be earned and become payable in respect of " the said voyage" *(Bond, p. 9)*.

And, again:

> " the said James H. Killeran doth by these presents mortgage, " hypothecate and charge the said vessel, her boats, tackle, " apparel and furniture, and her cargo including that portion " of the cargo transhipped to the *Mary J. Leslie*, and the " freight to be earned and become payable in respect of the " said voyage" *(Bond, p. 9)*.

The bill of lading issued by the *Mary J. Leslie*, signed by her master, W. L. MacLeod, recited that the cargo was shipped by J. H. Killeran, captain of the American ship *Andrew Johnson*, and bore this endorsement:

" The 8,449 bags of nitrate of soda as per this bill of lading,
" are included in and jointly responsible with the nitrate of
" soda specified in the bottomry and respondentia bond given
" to Messrs. Grace Bros. & Co. as security for the payment
" of the American ship *Andrew Johnson's* disbursements in
" Callao."

" Callao, 25th Sept., 1884.

W. L. MacLeod." *(Ex. B., p. 11).*

This portion of the cargo having been thus subjected specifically to the bond, how can it be said to have been relieved of the lien?

It has been claimed that the bond was made void by reason of the loss of the *Andrew Johnson.*

A. It is a general maritime principle that the lien of the bottomry bond attaches to and is enforceable against any salvage realized from the hypothecated property.

Even though it be considered that the *Andrew Johnson* and the cargo remaining on board of her became an " utter loss," still that portion of the cargo which arrived in Hamburg must be treated as salvage applicable to the payment of the bond.

This principle of the right of the bottomry lender to resort to salvage, whenever and wherever found, upon the breaking up of the voyage upon which the bond was conditioned, does not belong to merely local Hamburg law but is a part of the general maritime law of the world.

The decision of Dr. Stammann and Dr. Wolffson clearly states the law in Hamburg upon this point:

" According to the law here, ship, freight and cargo of the
" *Andrew Johnson*, as well as the portion of the cargo which
" was transhipped into the *Mary J. Leslie*, are jointly liable
" for the whole amount raised on bottomry at Callao, and,
" therefore, the *Andrew Johnson* and her cargo having become
" a total loss, the holder of the bottomry bond can come upon
" that portion of the cargo which was shipped by the *Mary J.*
" *Leslie* for the whole amount of his claim."

Record, p. 33.

This opinion is concurred in by two other Hamburg counsel, Mr. Schroeder and Mr. Nolte *(pp. 29, 31)*, and no different opinion has been expressed by any witness.

It is in strict accord with the Commercial Code of Germany, which provides:

"Art. 691. A bottomry creditor is not liable to contribute "to general or particular average. In case, however, *the bot-* "*tomried objects* become, by reason of general or particular "average, insufficient for the payment of the bottomry creditor, "he shall bear the loss thereby caused."

"Art. 692. All the *bottomried objects* are jointly and sever- "ally liable to the bottomry creditor. After the arrival of the "vessel at the port of destination of the bottomry voyage, "the creditor can apply for an arrest of all bottomried ob- "jects, even before his claim becomes due.

"Art. 699. * * * When the bottomry voyage does not "terminate in the port of destination, but in another port, the "bottomry debt must be paid in the latter port without de- "duction from the premium, after the expiration of the stipu- "lated time for payment, or, in default of an agreement, after "the expiration of eight days; such time of payment to be "calculated from the definite abandonment."

German Commercial Code, Arts. 691, 692, 699; Record, pp. 37, 38.

It is to be noted that, under article 691 the bottomry lender's security is diminished not merely by physicial deterioration and loss of the bottomried objects, but by the reduction of their value through general average charges.

Hamburg was the port of destination named in the bond, and the cargo transported by the *Mary J. Leslie* was within the jurisdiction of the Hamburg courts, so that it was there subject to any action that might be instituted by the bondholder. It may be said therefore that the law of Germany, even if such law had been peculiar to that nation, was the law measuring the rights of the bondholder.

But the law giving to the bottomry lender a remedy against any salvage from bottombried objects, was not peculiar to Germany.

It is the general maritime law, and finds expression now in the codes of all the continental countries of Europe and South America, and is recognized by the courts and the elementary writers of this country. In England alone has any question arisen as to the validity of the principle.

The Sea Laws of France, promulgated in August 1681, provide:

"XI. All contracts of bottomry shall be null *after the entire* "*loss of the effects* upon which the money was lent, if that "happens by accident and within the time and places therein "expressed."

"XII. Nothing shall be reputed accident that is occasioned "by the vice of the things themselves, or by the fault of the "owners, master or merchants, except it be otherwise provided "by the contract."

"XVII. However, in cases of shipwreck the contract of "bottomry shall be *reduced to the value of the effects* that are "saved."

Ordonnance of Louis XIV, Sect. XXV, Art. 1.

The Commercial Code of France provides:

"Art. 327. In case of shipwreck, the payment of the sum "loaned on bottomry is limited to the value of the effects "saved and hypothecated under the contract, deduction being "made for the expenses of salvage."

Nouveau Code de Commerce.

In commenting upon this section Boulay-Paty says:

"Though the law mentions only the case of 'shipwreck' it "is necessary to recognize, as do Pothier and all writers, that "the case of 'shipwreck' is specified only as an example."

"Art. 327 is applicable in all cases when by *force majeure* "*ou cas fortuit* some portion of the goods affected by the "bottomry loan has been lost, and the remainder saved."

Boulay-Paty, Droit Commercial, Vol. 3, 179, 180, 183, 184.

Valin, while recognizing the right of the bottomry lender against the remnants or salvage of bottomried objects, argues that he should share in such salvage only in the proportion that the value of the saved objects bears to the original value of the bottomried objects.

Valin, L'Ordonnance de la Marine, Tome II Liv. III Tit. V, § 17, p. 195

Pothier combats this doctrine and argues convincingly that while the claim of an insurer may properly be reduced proportionately, that of a bottomry lender cannot be, upon the ground that when insurance of 5,000 francs is made on 20,000 francs of value, all is not insured, but that when 15,000 francs is loaned on 20,000 francs of value, all is pledged.

Oeuvres de Pothier, Edition 1806-1813, Vol. 16, Contrat d' Assurance, edited by Estrangin, p. 485.
Boulay-Paty, Droit Commercial, Vol. 3, 184.

Emerigon is decisive in saying that neither the borrower nor his insurer can put forward a claim to any portion of the articles saved until the lender has been fully satisfied.

Boulay Paty, Droit Commercial, Vol. 3, 184, 186 : Emerigon, Contrats a la Grosse, Tome 2, p. 548, § 2.

Pardessus says :

" The lender has a privilege for the entire amount due " to him against the objects hypothecated by the loan ; and " if these objects are of different nature, for example, if he " has loaned at the same time on the hull and the cargo, " his privilege is indivisible in such manner that if the ship " perish and the cargo is saved, the cargo is charged with the " whole of the loan, and this is so without any necessity of " showing that the expenses have, in fact, been incurred for the " benefit of such object."

Pardessus, Droit Commercial, Part IV, Tit. VI, Ch. IV, Sect. 2, Art 918, Vol. 3, pp. 557, 558.

The Commercial Code of Spain, founded on the Consulado del Mar, provides :

" In case of shipwreck the sum payable as the loan is re- " duced to the amount of the proceeds of the property saved, " less salvage charges."

Book III, Tit. 3, Sec. II., Art. 734.

Substantially the same provision is found in Italy :

" If the loss is partial, the payment of the sum loaned is " reduced to the value of the things hypothecated to the loan " and which are saved, without prejudice to the payment of " the expense of salvage and the payment of privileged claims " to which preference may be due."

Codice di Commercio, Libro 3, Titolo 5, § 599.

And in the Netherlands the provision is :

" If the objects upon which the bottomry loans have been " made are entirely lost, or are captured and declared lawful " prize, and the loss or capture have occurred through mis- " fortune or *force majeure* within the times and limits of the " risk, the sum loaned cannot be demanded. If a portion of " the pledged objects is saved, the lender preserves his rights " against such saved objects, but nothing further."

Commercial Code, Book II, Sec. 588.

This codification is a preservation of the doctrine of the early Dutch writers.

Bynkershoek, following Grotius, says in his chapter headed, *De Contractu qui dicitur Bodemery*, that when the ship and its furniture have been hypothecated "*quicquid ex navi & instru-*" *mentis superest creditoribus cedere.*" *Bynkershoek, Quaest. Pub. Liber III., Cap. XVI., p. 509.*

And another Dutch writer says:

" When the ship is lost, but some part of the tackle is pre-
" served, either by floating ashore or by salvage, the creditor on
" bottomry is preferred on their proceeds so far as they extend,
" since bottomry is on the security of the ship's keel and
" tackle; but when these are insufficient the borrower is not
" liable further."

Van der Linden on the Laws of Holland, 613.

For more than a hundred years, at least, the bottomry lender has had the benefit of salvage in Denmark.

Walpole vs. Ewer, reported in *Park on Marine Insurance, 2d Ed., p. 433.*

The Commercial Code of Portugal similarly provides:

" In case of wreck or of other great loss the payment of the
" sum taken on bottomry shall be reduced to the value of the
" things saved and which are affected by the contract, after de-
" ducting the salvage expenses. If this value exceeds the prin-
" cipal loaned the excess shall pay the premium which shall
" have been agreed upon or shall be applied on account of it
" in case it cannot be fully paid."

Codigo Commercial Parte II., Livro Unico do Commercio Maritimo, Tit. XIII., Art. XL., § 1660.

The laws of Peru, where the master of the *Andrew Johnson* gave this bond, are of the same purport.

" Sec. 857. In case of shipwreck the bottomry lender receives
" the proceeds realized from the saved objects in regard to
" which the loan was contracted after deduction of the ex-
" penses incurred for their salvage."

" Sec. 858. If in case of shipwreck there are insurers of the
" objects as well as a bottomry lender, the latter must be first
" satisfied, and then the insurers with the balance, *pro rata.*

Commercial Code of Peru, Sect. II., § 857, 858.

In England alone, of all maritime nations, has there been

any difference of opinion among writers, and the difficulties there may all be traced to a declaration of Lord MANSFIELD, in 1782, in the case of *Joyce vs. Williamson.*

The action was on a bottomry bond in the amount of £600 covering a voyage from Tagus to New York. The vessel was captured, and later was recaptured and taken into Halifax, where part of the cargo was sold for salvage and repairs. The value of the vessel on arrival in Halifax was £225, her repairs were £500, and, being repaired, she proceeded to New York. Verdict was given for the plaintiff on this bond, and upon a rule *nisi* for a new trial, Lord MANSFIELD said :

" It was admitted that on a bottomry bond there is no " average or salvage ; but it was contended that the case came " within the words of the clause making the bond void in case " of recapture by the enemy. But on consideration we are all " of opinion that the taking by the enemy there contemplated " does not mean a merely temporary taking, which is only an " obstruction. To come within the clause it must be such a " taking as constitutes the loss of the ship, and which would " amount, between insurer and insured, to a total loss. Here " there was no such total loss. The vessel earned her freight " and is safe. Either way it is a hardship ; but the law allows " no average or salvage on bottomry bonds and the rule must " be discharged."

Joyce vs. Williamson, 3 Douglas, 164.

This has undoubtedly been interpreted by many courts and writers to mean that a bondholder is not entitled to salvage when the voyage fails. Yet later English decisions seem based upon a contrary doctrine. Thus, in 1816 it was held that a bottomry lender could make no claim against his insurer for the loss of his bond, when the vessel had been driven by tempest into a port of refuge and had there been broken up and sold, it appearing that repairs would cost £3,200, and her value when repaired would be only £2,000. In this case Lord ELLENBOROUGH said :

" As nothing short of an actual total loss will discharge the " borrower of money upon bottomry, so nothing less will " render the insurer liable. * * * In the case of bottomry " nothing short of the total destruction of the ship will consti- " tute an utter loss."

Thompson vs. Royal Exch. Ass. Co., 1 Maule & S., 30.

In a more modern case Dr. LUSHINGTON in 1851 held :

" If a ship was once bottomried the bond attached to the " very last plank, and the holder might have that sold for his " benefit. I have no doubt that when the ship arrived at " Bahia, if she was unable to prosecute her voyage, the bond " instantly became due, the condition was gone, and the bond " was good."

The Catherine 15, Jurist Part I., 232.

See also, *The Elephanta 9 English L. and Eq. 553.*

In 1868 Sir ROBERT PHILLIMORE, evidently doubting the accuracy or applicability of Lord MANSFIELD'S language, questioned whether in the absence of a salvage clause in a bottomry bond thelender would not, by the general maritime law, have a right to the benefit of the proceeds of the wreck ; but did not consider it necessary to decide the question, saying :

" It is not necessary that I should express an opinion " whether, on the contingency of a wreck, the lender would or " would not be entitled to this kind of salvage by the common " law merchant, or whether, in order that he should have this " right, the insertion of these words was necessary."

The Great Pacific, L. R., 2 Adm. & Ecc., 381, 385.

Park, an early English writer on marine insurance, in considering Lord MANSFIELD'S dictum, refers to *Statute 19, George II., Ch. 32*, which allowed the benefit of salvage to lenders upon vessels or goods going to the West Indies :

" clearly showing that there was no such thing (as salvage) at " *common law :* otherwise there was no occasion."

and adds :

" In this respect our law differs from that of France and " also from that of Denmark, *vide* Walpole vs. Ewer."

Park on Marine Insurance, 2d Ed., 423.

Other English elementary writers have attributed Lord MANSFIELD'S ruling to the influence of the common law, or have disagreed with him outright.

Sergeant MARSHALL says :

" It must be admitted, however, that without the benefit of " salvage this contract must partake greatly of the nature of a " wager, even when the money is lent upon goods on board of

" equal value. If there be a total loss of the ship, the lender " loses all, though all the goods are saved."

Marshall on Marine Insurance, 5th Ed., 599.

Mr. Phillips, an American writer, says:

" It seems that in the earlier stages of English commercial " jurisprudence lenders on bottomry, or at *respondentia*, as- " sumed only the risk of total loss; but they now usually as- " sume the losses for which underwriters are liable in the com- " mon form of policies of insurance, and are entitled to sal- " vage."

Phillips on Insurance, Sec. 1484a.

See also, *Sections 1168, 1170, 1175.*

Mr. MacLachlan throws off Lord Mansfield's authority, and says:

" So long as the ship remains in specie and under the con- " trol of the owners, the validity of the bond survives. She " may remain in specie a ship, but, being captured as prize of " war, the loss is total and the bond defeated. If she ceases " to be a ship by reason of unavoidable sea perils, the bond- " holders' lien *attaches to the salvage*, if there be any."

MacLachlan on Merchant Shipping, 4th Ed., 129.

With this uncertainty in Great Britain, it has been not uncommon, in drawing a bond, to give to the lender specifically a remedy against all salvage. But such specific remedy did not appear in the bonds passed upon by Dr. LUSHINGTON in the *Catherine*, or by Lord ELLENBOROUGH in *Thompson vs. The Royal Exchange Insurance Company.*

The Admiralty law of the United States is drawn from the general maritime law, and not from the English common law.

The Scotland, 105 U. S., 24.

The courts and elementary writers sustain the principle that, even without a specified privilege in respect to salvage, the bottomry lender may look to salvage.

Kent refers to Lord MANSFIELD'S ruling in *Joyce vs. Williamson*, and says that it has been

" much and justly questioned in the elementary works. It is " contrary to the maritime law of France, and of other parts of " Europe."

Kent's Commentaries, 14th Ed. 3, 359.

And the writer states his own conclusions as follows :

" Nothing but an utter annihilation of the *subject hypothe-*
" *cated* will discharge the borrower on bottomry. The prop-
" erty saved, whatever it may be in amount, continues subject
" to the hypothecation. The lender can look only to what is
" saved ; and if that be not equal to the value of the loan, the
" lender must bear the loss of the residue, and he cannot re-
" cover the deficiency of the borrower. By the general mari-
" time law the lender on bottomry is entitled to be paid out of
" the effects saved so far as those effects go, if the voyage be
" disastrous."

Kent's Commentaries, 14th Ed., Vol. 3, 359, 360.

In 1807 the Supreme Judicial courts of Massachusetts discussed this question in the case of *Appleton vs. Crowinshield.* While they were unable to sustain the particular form of action in which the plaintiff sought relief, they held in fact that the lender was entitled to any salvage arising from the adventure.

Appleton vs. Crowninshield, 3 Mass. 443, pp. 463, 467, 473, 474.

And later, when an action was brought before them in different form, the claim of the bondholder was sustained.

Appleton vs. Crowinshield, 8 Mass. 340, pp. 357, 362.

In this court it has been held :

" Where the bond only covers the ship, the lenders run
" no risk as to the cargo, as they must be paid if the ship
" arrives in safety, even though the whole cargo is lost ; but
" where the bond covers the cargo as well as the vessel, the
" lender, unless the condition is otherwise, is entitled to be
" paid even if the ship is lost, if enough of the cargo arrives
" in safety to pay the bottomry loan, the rule being that the
" maritime lien of the lender attaches to the entire property
" covered by the bond, or to all that part of it which arrives at
" the port of destination in safety."

Insurance Company vs. Gossler, 96 U. S., 647, 655.

In that case the bond contained a salvage clause. For that reason, perhaps, the following paragraph may be deemed *obiter*, and not controlling upon the present case ; but it is at least entitled to great respect.

" By the general maritime law the lender on bottomry is " entitled to be paid out of the effects saved, so far as those " effects go, if the voyage be disastrous."

Insurance Company vs. Gossler, 96 U. S., 645, 656.

B. We submit, therefore, that the bottomry lender was entitled to enforce payment at Hamburg against the cargo shipped in the *Mary J. Leslie*, as being salvage or remnants from the " objects " or " subjects ", or " effects " originally hypothecated, and that the payment of the bond by the libellants was therefore in no sense a voluntary payment.

The question of the rights of the bottomry lender against salvage was dismissed from consideration by the Circuit Court of Appeals with the remark that it was " not necessary to discuss the question," because " there has been no salvage either of cargo or ship in this case."

Opinion Record, p. 64.

But the cargo on the *Mary J. Leslie* was as clearly salvage from the effects or subjects hypothecated, as would have been cargo or wreckage from the hull of the *Andrew Johnson.*

Second.

ASIDE FROM THE RIGHTS OF THE BOTTOMRY LENDER AGAINST THE CARGO IN HAMBURG, AS SALVAGE, HE HAD SPECIFIC RIGHTS UNDER THE BOND, UNIMPAIRED BY THE LOSS OF THE ANDREW JOHNSON.

Under a proper construction of the bond, the rights of the bottomry lenders were not affected by the loss of the *Andrew Johnson.*

The provision was that the " obligation " should become void upon payment of the amount of the bond by the master of the *Andrew Johnson*, and provides :

" Or if during the said voyage an utter loss of the said ves- " sel by fire, enemies, pirates, the perils of the sea or naviga- " tion, or any other casualty shall unavoidably happen to be

" sufficiently proved by the said James H. Killeran, then and " in either of the said cases this obligation shall be void, other- " wise to be and remain in full force and virtue."

Bond, p. 10.

The sinking of the *Andrew Johnson* by the *Thirlmere* at sea, and the consequent non-arrival of the *Andrew Johnson* in Hamburg, rendered null and void only the personal obligation of the master, and did not void the bond as against the cargo which arrived by the *Mary J. Leslie.*

The master, in giving the bond, said :

" I bind myself, my heirs, executors or administrators " *(Bond, p. 8).*

The charge thus made upon the master and his personal estate, was given merely as a pledge of good faith, in recognition of the liability falling upon him under the maritime law, and codified in the German Commercial Code as follows :

" ART. 694. When the master has arbitrarily changed the " bottomry voyage, or when he has arbitrarily deviated from " the proper course, or when, after its termination he has again " exposed the bottomry objects to sea risks without having " been compelled to do so in the interest of the creditor, " the master is personally answerable to the creditor for the " bottomry debt, so far as the latter does not receive his pay- " ment out of the bottomried objects, unless he proves that " the non-payment has not been caused through the change of " voyage, or through the deviation, or through the new sea " risk.

ART. 695. The Master shall not deliver the bottomried " cargo, either entirely or partially before the creditor has been " paid or properly secured ; otherwise the master is personally " answerable to the creditor for the bottomry debt, so far as he " could, at the time of this delivery, have been paid by the goods " so given up. Until the contrary has been proved it shall " be considered that the creditor could have been paid in " full."

German Commercial Code, Arts. 694, 695 ; Record, p. 37.

The Code of Peru provides similarly :

" The claim of the lender is not extinguished, even if the " goods pledged for payment of the loan perish in so far as the " damage to them results from one of the following causes :

" 1. From the inherent defect of the goods themselves.

" 2. From *dolus* or *culpa* of the borrower.
" 3. From barratry of the master or crew.
" 4. If the goods are shipped by another vessel than the " one named in the contract, unless it becomes necessary to " tranship the cargo from the ship so named to another, in " consequence of *vis major*."

Commercial Code of Peru, Sect II., §850.

The same principle is recognized in the Admiralty Rules of this Court.

" In all suits on bottomry bonds, properly so called, the " suit shall be *in rem* only against the property hypothecated, " or the proceeds of the property, in whosoever hands the same " may be found, unless the master has, without authority, given " the bottomry bond, or by his fraud or misconduct has avoided " the same, or has substracted the property, or unless the " owner has, by his own misconduct or wrong, lost or sub- " stracted the property, in which latter cases the suit may be " *in personam* against the wrongdoer."

18th Admiralty Rule, U. S. Supreme Court.

And similar provisions are universal in the codes and laws of European countries.

There are different points of view, from which it appears that the sinking of the *Andrew Johnson* did not void the bond as against the cargo which arrived by the *Mary J. Leslie.*

These views are sustained, not only by the grammatical construction of the bond, but by the significance to be given to the words " utter loss."

A. Even if the *Andrew Johnson* had proved an " utter loss," the bond would not be forfeited thereby; for the words " said vessel " in the defeasance clause relate, clumsily perhaps, but clearly, to either the *Andrew Johnson* or the *Mary J. Leslie.*

The instrument should be construed liberally.

Abbott on Shipping, 12th Ed., p. 112.

" For the reason that a bottomry bond is supposed to have " saved the ship, it is construed very liberally by all Courts, " and, if possible, the intention of the parties is carried into " effect."

Parsons on Shipping and Admiralty, Vol. 1, 162.

a. The same words " said vessel " are used earlier in the defeasance or condition clause in this connection:

" Now, the condition of this obligation is such, that if the " said vessel shall forthwith set sail from Callao aforesaid, and " without unnecessary delay or deviation proceed on her in- " tended voyage to Hamburg, and if the above bounden James " H. Killeran shall and do within the space of five days next " after the arrival of the vessel at her final port of destination, " and *before commencing to discharge the cargo,* * * * well " and truly pay or cause to be paid, &c., &c., &c.," *(Bond, pp. 9, 10).*

Here the words " the said vessel " clearly relate to both the *Andrew Johnson* and the *Mary J. Leslie,* for it is apparent that it could not have been contemplated that, in the event of the arrival of the *Mary J. Leslie* in Hamburg earlier than the *Andrew Johnson,* she would lie in Hamburg " before com- " mencing to discharge the cargo " pending the possible arrival of the *Andrew Johnson.*

If " the said vessel," in the earlier part of the defeasance clause, refers to each of the two vessels, then it certainly must carry the same meaning when next used in a later position in the same clause.

b. Only by such construction can due effect be given to the intention of the parties.

It was clearly the purpose of the parties to the bond that whatever got through to Hamburg, whether the *Andrew Johnson,* or whether the *Andrew Johnson's* cargo, or whether the *Mary J. Leslie's* cargo, should be held to pay the bond.

The *Andrew Johnson* herself was worth $60,000 *(O'Brien, p. 23, Killeran, p. 40).*

The major part of her cargo remained on board of her and was worth nearly $50,000. Her freight was about $20,000 *(Exh. 3, p. 19).*

It is apparent, therefore, that the *Andrew Johnson* and the cargo on board of her were amply sufficient to protect the bond, being nearly ten times the amount of the bond, if the parties had intended to limit their security to the one bottom of the *Andrew Johnson.*

Though the security was enormous in amount, the parties apparently were not content to rely upon one bottom, and therefore included the cargo of the *Mary J. Leslie,* which was worth about $40,000 *(Wirtz, p. 31).*

If the *Andrew Johnson* and her cargo and freight had ever reached Hamburg, the security afforded to them was so ample that the bondholder would have no occasion to look to the cargo on the *Mary J. Leslie.*

We must assume, therefore, that the cargo on board the *Mary J. Leslie* was subjected to the bond in order that the bondholder would have security even though the *Andrew Johnson* and her remaining cargo did not reach destination.

c. The learned District Judge accordingly construed the bond as enforceable against the cargo arriving by the *Mary J. Leslie.* He did this at a time when the question came before him on exceptions to the libel, at which time it was supposed by him that the *Andrew Johnson* had become an "utter loss" *(Opinion, pp. 41-45.)*

It is significant that, since the Court so interpreted the bond, both the master and the owner of the *Andrew Johnson* have been called as witnesses, and neither of them has suggested that there was any intention to make the bond depend upon the arrival of the *Andrew Johnson* at Hamburg.

This question was passed upon, too, by the Hamburg counsel of the bondholders and of the cargo-owners, to whom the question of the liability of the *Mary J. Leslie's* cargo was submitted. They said:

"Some doubt might be raised as to whether, according to "the wording of the bottomry bond, the money was not lent "or appear to be lent contingent upon the safety of the "*Andrew Johnson*, and becoming due only after her arrival at "her port of destination, but becoming null and void in the "event of her non-arrival. We are of opinion, however, that "this interpretation is not consistent with the real intention "of the contracting parties, and that the wording referred to "has originated in the not sufficiently careful use and employ-"ment of a form of bond which happened to be at hand. This "seems the less doubtful to us for this reason, that if the "bottomry bond were interpreted in this manner, the cargo of "the *Mary J. Leslie* would be entirely liberated, after the loss "of the *Andrew Johnson* occurred, and would not even bear a "portion of the bottomry debt, which nevertheless has arisen "out of a case of general average. Manifestly this cannot "have been the intention of the parties interested" *(Record, p. 33.)*

d. The construction given to the bond by the Judges of the Circuit Court of Appeals, is literal in the extreme, and to an extent that deprives the instrument of its palpable and necessary meaning. They construe the words "said vessel" to refer solely to the *Andrew Johnson.*

To their minds the master referred only to the *Andrew Johnson* when he stated that he had been unable to obtain funds:

"in any other way than by bottomry and hypothecation of the "said vessel, her boats, apparel, cargo, and freight."

Although in the very next paragraph he pledges specifically and in terms:

"the cargo transhipped to the *Mary J. Leslie*"

and thereby secures the funds which he has just said that he was unable to get, except by a bottomry of the "said vessel" and her cargo. *(Bond, p. 9).*

Stress is laid upon the recital of the bond that the lenders

"are contented to stand to and bear the risk, hazard and ad-"venture thereof upon the hull, body or keel of the said "*Andrew Johnson*, her boats, tackle, apparel and furniture, "together with the cargo laden on board as aforesaid, and the "freight to be earned and become payable as aforesaid." *(Bond, p. 9)*

as indicating that the agreement was merely a wager between the borrower and lenders as to the arrival of the *Andrew Johnson* at destination with the remnant of cargo which she was herself carrying, and that the lenders having thus "staked" their money must lose it. *(Opinion, p. 64).*

The clause appears in the fifth paragraph of the bottomry bond, and in that paragraph falls between a recital that Grace Bros. & Company, the lenders, have agreed to lend the required funds to the master

"upon his executing this present bond or obligation and "hypothecation of the said vessel, her boats and apparel and "her cargo, including that portion of the cargo transhipped to "the *Mary J. Leslie*, and the freight to be earned and become "payable in respect of the said voyage"

and the formal engagement by which the master did

" mortgage, hypothecate and charge the said vessel, her boats, " tackle, apparel and furniture, and her cargo, including that " portion of the cargo transhipped to the *Mary J. Leslie*, and " the freight to be earned and become payable in respect of " the said voyage.

Here there came (1st) a recital of the agreement to lend on the cargo

" including that portion of the cargo transhipped to the *Mary* " *J. Lestie*",

and (2nd) a recital of the hazards and adventures which the lenders are content to take upon the vessel

" together with the cargo laden on board, *as aforesaid*";

and (3rd) the formal pledge of the vessel and cargo

" including that portion of the cargo transhipped to the *Mary* " *J. Leslie*".

It cannot indeed, be said that the bond is perfect in expression, or that there had been a "careful choice of words" to express the meaning of the parties; but certainly it is apparent that the lenders intended that the agreement to lend, the hazard, and the pledge, should relate to the same property.

But a different construction was given by the Circuit Court of Appeals.

B. In fact, moreover, the *Andrew Johnson* did not become an "utter loss."

She went to the bottom of the sea as the result of the collision with the *Thirlmere*; but that fact did not render the owner's interest in her valueless, for the very circumstances which sent her to the bottom gave to him a claim for the value of his vessel and freight against the *Thirlmere*. For that value and to the limit of that value, if necessary, he must account to persons having claims against the vessel or against himself based upon the events of the voyage.

We are well aware, of course, that the shipowner is not obliged to account for his insurance moneys; but the language of the Supreme Court, in relieving the owner from accounting

for insurance, clearly indicates that he is bound to account for moneys received by him, not under an independent contract of insurance, but through rights based purely upon ownership of the vessel.

City of Norwich, 118 U. S., 468, 493, 503, 504.

The purpose of granting limitation of liability at all is to enable merchants to invest money in ships without subjecting them to "an indefinite hazard of losing their whole property "by the negligence or misconduct of the master or crew; but "only subjecting them to the loss of their investment." This Court has accordingly held that if a merchant contracts with an insurance company for indemnity against even the loss of his investment, he may be permitted to do so without any obligation to account for the proceeds of such contract *(p. 504)*.

When a right of recovery exists, however, based not upon an independent contract of insurance, but upon the very loss itself by regular operation of law, because of ownership in the vessel, and not because of an independent contract, the case is different. Then a recovery is, in effect, the vessel or the freight which it represents; and such vessel and freight is not an "utter loss." The shipowner hazards nothing beyond "the loss of his investment."

The right of recovery which came to the owner of the *Andrew Johnson* by reason of the sinking of his vessel, was valuable. He presented it in the courts of Great Britain and received £5179-13-6 on account of his freight vessel, and £858-6-11 on account of his freight *(O'Brien, p. 24)*. He did not recover full payment only because the *Thirlmere* was insufficient in value to pay all losses, and her owners under the operation of the British statutes for limitation of liability, paid only a dividend.

C. The payment by the libellants of the bond was substantially a forced payment.

The *Mary J. Leslie* arrived in Hamburg, February 5th. The nitrate of soda had been shipped in the name of the master of the *Andrew Johnson* and subject to the terms and conditions of the *Andrew Johnson's* original charter party, and as being "included in and jointly responsible with the nitrate of

" soda specified in the bottomry and respondentia bond given " to Messrs. Grace Bros. & Company as security for the pay- " ment of the American ship *Andrew Johnson's* disbursements " in Callao." *(Bill of Lading, p. 11).*

By the terms of the bond it fell due February 10th, five days after arrival of the cargo in Hamburg, and on that date formal demand was made by a notary *(Stockfleth, p. 30).* In the absence of specific provision in the bond regulating the time of payment, the statutory due date was eight days after arrival *(German Commercial Code, Art. 699, Record, p. 48).*

No discharge of the cargo was made meantime, nor was any permitted until after arrangements had been effected between Antony Gibbs & Sons and Baring Brothers & Company to secure the payment of the bond.

On the 11th of February, in order to secure the release of the cargo, Antony Gibbs & Sons gave a formal written engagement to Baring Brother & Company to pay " whatever pro- " portion of the said bottomry and respondentia bond may " be found to be legally due from the said cargo " *(Sillem p. 26, Exh. A, pp. 26, 27).* This engagement was accepted by Baring Brothers & Company, and the discharge of cargo began about the 16th of February *(Wirtz, p. 30).*

Immediate steps were taken to ascertain the law, and it was under the advice of eminent lawyers representing each party that the amount of the bond was paid *(Wirtz, pp. 30, 31 : Wolffson, pp. 32, 33 ; Stammann, pp. 33, 34).*

Third.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS WITHOUT PRECEDENT TO SUSTAIN IT.

The learned Judges say :

" No doubt damages recovered for the tortious act of a " colliding vessel are often treated in admiralty as a substitute " for the destroyed vessel. But the hazard taken by the " bottomry bondholder is the physical survival of the ship, or " at most of any salvage from her. When she goes to the

" bottom with all she holds, there is an utter loss within the " meaning of the contract of bottomry, and the bond goes down " with the vessel " *(Opinion, p. 65).*

We submit that, it being the practice of the Courts of Admiralty to treat damages recovered for the tortious act of a colliding vessel as a substitute for the destroyed vessel, such damages or right to damages constitute salvage.

No authority is cited to show that such a loss is an " utter loss " within the meaning of a contract of bottomry, and such a doctrine is certainly inconsistent with the universally-accepted doctrine that the damages may be taken to represent the destroyed vessel.

Even if the damages so recoverable are not a *res* that can be proceeded against by the bondholder, still the fact of the existence of the right to such damages relieves the situation from being one of " utter loss," and prevents the bond becoming void.

If there is not an " utter loss," then the bond is not rendered void, and is certainly operative upon all surviving pledged property, whatever might otherwise be the liability of such property.

German Commercial Code, Arts. 691, 692. Record p. 37.

It should be borne in mind that this action is not one for the enforcement of the bond, but that it is an action brought by the owner of cargo, who has upon demand and under the deliberate advice of eminent counsel paid the entire bond in the belief that he was legally bound to make such payment, to enforce contribution from the shipowner for his proportionate share of the expenses for which the bond was given.

Fourth.

THE BOND, BEING VALID AS AGAINST THE CARGO, AND ENFORCEABLE AGAINST THAT PORTION OF THE CARGO ARRIVING IN HAMBURG ON THE MARY J. LESLIE, THE LIBELLANTS, UPON PAYMENT OF THE BOND, BECAME ENTITLED TO RECOVER FROM THE SHIPOWNER HIS PROPORTION OF THE EXPENSES INCURRED AT CALLAO.

The expenses at Callao grew out of the distress into which the *Andrew Johnson* fell at sea. Some of them were properly chargeable upon the ship alone, some upon the ship-owner alone, some upon the cargo alone, and some upon all interests.

They might have been paid at the time by the respective parties or by either of the parties; but, in accordance with custom, it is usual to make the assessment or distribution or contribution at the end of the voyage.

If the shipowner had paid the expenses at Callao, or if he had taken up the bond at Hamburg, he would have reimbursed himself through a statement and adjustment of general average for such portion of the expenses as was properly chargeable upon the cargo, taking from the consignees of cargo, upon discharge of the cargo, a general average bond.

The shipowner neither paid the expenses at Callao, nor did he take up the bond; but left payment upon the bond to be enforced from the owners of the cargo.

The owners of the cargo having paid all charges is legally titled to contribution upon a proper statement and adjustment.

Benson vs. Duncan, 1 Exch., 537; 3 Exch., 644.
Appleton vs. Crowninshield, 8 Mass., 340, 360.

The principle was fully recognized by Chief-Justice TANEY, though in the case then under consideration by him he relieved the shipowner from actual payment, upon the ground of limitation of the shipowner's liability, the vessel in that case having been already exhausted by the bond.

Naylor vs. Baltzell, Taney's Decisions, 55.

The owner of the *Andrew Johnson*, however, did not lose his vessel. Aside from his reimbursement through insurance, with which we have nothing to do, he received from the pro-

ceeds of the *Thirlmere*, on account of his vessel, £5,178–13–6, and on account of her freight £858–6–11 *(O'Brien, p. 124)*. These figures represent "the amount or value of the interest "of such owner in such vessel, and her freight then pending," which is established by statute to be the limitation of the shipowner's liability.

U. S. Revised Statutes, Sec. 4283.

Every equity is with the libellants.

By the exigencies of the voyage they have been forced to pay the expenses which should have been paid by the shipowner—expenses which, in fact, repaired and preserved the shipowner's property, and gave to it at least some part of the value for which compensation was made to him by the *Thirlmere*.

Fifth.

THE SHIPOWNER, BEING UNDER PERSONAL LIABILITY TO THE BOTTOMRY LENDERS TO ACCOUNT TO THEM FROM THE MONEYS COLLECTED FROM THE THIRLMERE, HAS NOT BEEN PREJUDICED BY THE PAYMENT OF THE BOND BY THE LIBELLANTS.

If the bottomry lender had, under the authority of *Appleton vs. Crowninshield*, collected the entire bond from the shipowner, it would have remained for the shipowner to cause an adjustment to be stated and to seek contributions from the owners of the cargo. As matters now stand, the cargo owners have paid the bottomry lender and have caused the adjustment to be made, and they seek contribution from the shipowner.

Such an adjustment states accurately the ultimate liability of the shipowner and the cargo owners. It is legally immaterial which interest makes the advance primarily.

The case of *Appleton vs. Crowninshield* is of peculiar pertinence to the point now being considered. It engaged the attention of the Massachusetts courts for nearly twenty years.

As originally instituted it was an action of debt bronght on a bottomry bond.

Appleton vs. Crowninshield, 3 Mass., 443.

The loan had been effected in Salem, November 25, 1793, on the schooner *Charming Sally*, in the amount of £300, covering a voyage to the West Indies and back to Salem.

The outward voyage was safely made, but on the return voyage the schooner was captured by the British and condemned. Afterwards the Lords Commissioners of Appeals in Great Britain reversed and annulled the decree of condemnation. The schooner was not, however, returned in specie to her owner, but an award for her full value was paid by Great Britain to her owner, Crowninshield.

The case came before the Supreme Judicial Court in November 1807. The defendant contended that the bond was void, in that the schooner never performed her voyage and had never returned to Salem.

The plaintiff, by way of replication, set up the capture and condemnation of the schooner, and the subsequent award to her owner.

Upon these pleadings the Court held that the action of debt on the bond would not lie, holding however that the award constituted a salvage for which the ship owner would be accountable to the bottomry lender in a suitable form of action *(p. 467)*.

Justice PARKER said :

" In equity the plaintiff's case is undoubtedly very strong ; " and I can see no principle of commercial honor upon which " the money can be withheld by the defendant ; but we must " decide upon the established legal principles, and are not at " liberty to wander into the field of equity to do justice to the " parties. The question with us is, whether any event within " the condition of the bond has happened whereby the obligor " is discharged from his contract." *(p. 461)*.

Justice SEWALL said :

" The compensation received by the borrower, the defend- " ant, may comprise *a salvage* for which he is accountable to " the lender, the plaintiff ; but a demand of that nature, if it is " recoverable, must be maintained in another form of action." *(p. 468)*.

Justice SEDGWICK said :

" I cannot omit to observe that it is impossible for the " mind to doubt with which of these parties the justice of the

" case rests. The defendant has received, and now holds, the " plaintiff's money. With a good conscience he certainly can- " not retain it ; and I confess that I should exceedingly regret " if he was authorized to do it by the positive rules of law." *(pp. 469, 470).*

But the action could not be maintained as an action of debt on the bond.

Subsequently the bottomry lender brought a new action, still at common law, against Crowninshield, on *assumpsit* for money had and received, which came before the same Court and the same Judges in 1811, and was then sustained.

Appleton vs. Crowninshield, 8th Mass. 340.

The owner of the *Andrew Johnson* recovered from the owners of the *Thirlmere* more than $30,000, because of the loss of his vessel and freight through collision.

This recovery constituted a salvage which might be proceeded against *in rem*, or in respect to which an action would lie in favor of the bottomry lender against the ship owner at common law for money had and received.

By paying the bond the cargo owners have not prejudiced the ship owner or increased his liabilities. If after payment they had brought an action for the whole amount of the bond, leaving him to offset the share due from the cargo by way of contribution in general average, such action would not be to his prejudice.

In place of such action the cargo owners have recognized their liability to contribute in general average, and have brought action against the ship owner only for his contributory share.

The libellants might even be treated as assignees of the bond, and entitled to the rights of the bottomry lender, at least to the extent of the shipowner's contributory share without any hardship to the ship-owner. He would be repaying only what was expended for his account at Callao—an expenditure which preserved his property and entered into the value which he recovered against the *Thirlmere*.

Sixth.

THE BOND WAS VALID AND WAS PROPERLY SECURED BY THE HYPOTHECATION OF THE CARGO.

In order to validate a bottomry bond made at a port of distress, it must appear that the expenses for which the bond was issued were necessarily or prudently incurred, and that they were for the benefit of such interests as were hypothecated in the bond.

The master can neither sell nor hypothecate his cargo except in case of necessity, and his authority for that purpose is no more than may be reasonably implied from the circumstances in which he was placed. He acts for the owner of the cargo, because there is a necessity for some one to do so, and, like every agent, whose authority arises by implication of law, he can only do what the owner, if present, ought to do.

The Julia Blake, 107 U. S., 418, 426.
Duncan v. Benson, 1 Exch. 537; 3d Exch. 644.
The Lizzie, Law Rep. 2 Ad. & Ec. 254.
The Karnak, Law Rep. 2 Ad. & Ec. 289.
The Onward, Law Rep. 4 Ad. & Ec. 38, 57.

As to the necessity and prudence of forwarding certain of the cargo of the *Andrew Johnson* and of raising the funds therefor by pledging the vessel, freight and cargo, neither the allegations of the libel nor the averments or denials of the answer are to control; but the facts admitted in the pleadings, and the proofs taken in the cause, must govern.

A. The libel alleges that it would have been better to make no repairs to the vessel, and to forward all the cargo in other bottoms, and that the arrangement that was adopted was for the advantage of the ship-owner *(Libel, Art. 4, p. 5)*. These allegations are denied by the ship-owner *(Ans. Art. 8, p. 12)*.

The proofs show that, in the opinion of surveyors, it was for the "interest of both the owners of the ship and "cargo" to forward a portion of the cargo in another bottom and to make sufficient repairs to the *Andrew Johnson* to enable her to proceed upon her voyage *(Ex. No. 5, pp. 20, 21)*.

The testimony of the master shows that he was governed by the recommendations of the surveyors *(Killeran, p. 17)*, and that he met the expenses thereby incurred by the bottomry and *respondentia* bond *(Killeran, p. 17)*.

It must, upon this condition of the pleadings and proofs, be held that the procedure adopted was prudent and wise.

This view is sustained by the fact that the repairs to the vessel were not of a costly character and that "most of the ex- "pense was incurred in transhipping the cargo" *(Killeran, p. 41)*.

The entire amount of the bond, including maritime premium was £2599-8-9, or about $12,500 *(Bond, p. 10)*. Of this entire sum only about $6,091.73 was chargeable against the ship, and that sum included the ship's share of general expenses, as well as those which rested upon her particularly *(Decree, pp. 55, 56)*.

These figures indicate that more than half the expenses were incurred primarily upon account of the cargo, and would require to be ultimately paid by the cargo in any general average adjustment. Considering the bulky character and comparatively low value of the cargo, the expense of transhipping the remaining portion of the cargo from the *Andrew Johnson* to other bottoms would have very greatly increased the charges upon the cargo.

It was not only the right, but the duty of the master to carry out as far as practicable the engagement which he had made of carrying the cargo forward in his own vessel.

The master is bound "to look out for the means of accom- "plishing his contract if possible; that is, the safe conveyance "of the property intrusted to his care, in that same vehicle "which he has contracted to furnish."

The Gratitudine, 3 C. Rob., 240, 261.

If the cargo-owner had insisted, at Callao, upon the surrender of all the cargo to him, that it might be forwarded in other vessels, he would have been bound, of course, to pay to the master of the *Andrew Johnson* the freight which the *Andrew Johnson* was entitled to earn. Such freight would have amounted to over $20,000 *(Charter, Ex. 3, p. 19)*.

The alternative of paying this large sum, together with the further expense of transhipping the cargo, makes conspicuous the wisdom of leaving as much of the cargo in the

Andrew Johnson as she could carry, even though the entire cargo thereby became subject to hypothecation under the bond.

B. The benefit to the cargo being established, it was proper to bind it for any necessary amount.

The libel alleges that large expenses were incurred

" in making the necessary repairs to the vessel and in supply-
" ing her to continue her voyage, and in transhipping the
" said portion of the cargo to the *Mary J. Leslie*, and in other
" matters pertaining to the seeking of the harbor of refuge, re-
" pairing his said vessel and preparing to carry and forward
" his cargo " *(Libel, Art. 5, p. 5).*

and that such expenses amounted in all to £2212-5-9.

The allegation is again revived that these charges were incurred for the benefit of the vessel and that the libellants, " not " being fully advised of the circumstances, and believing that " the said bond was properly and necessarily issued, assented " *(Libel, Art. 5, p. 6).*

The answer admits that expenses were incurred " in mak-
" ing necessary repairs to the ship and in supplying her and in
" transhipping the said portion of her cargo " and that the sum thereof, to wit, £2212-5-9, was borrowed by the master upon bottomry and *respondentia*, and was " applied by the
" master to paying and defraying the costs and expenses in-
" curred at the said port of refuge " *(Ans. Art. 9, p. 12).*

The proofs established in detail the expenses incurred, vouchers for all having been proved by the master *(Killeran, p. 18).* These expenses were, as the master states, in a deposition read by the respondent, largely incurred in transhipping expenses *(Killeran, p. 31).*

The detailed expenses are set forth in the adjustment made by Commissioner Walker under the interlocutory decree, that adjustment being transmitted to the Court in its original shape *(Rec. fol. 267).*

C. It was urged by the respondent in the Circuit Court of Appeals that the bond was void as to cargo, upon the asserted ground that communication respecting the bond was not had with the cargo-owners prior to pledging the cargo.

a. It is not, however, essential in all cases to communicate with the cargo-owner.

The bond in the case of the *Lizzie*, was sustained though there was no communication with the owner of the cargo.

The Lizzie, 2 Ad. & Ec. 254.

The bond, in the case of the *Karnak*, was sustained though, in that case, there was no communication with the owners of the cargo.

The Karnak, Law Rep. 2 Ad. & Ec. 289 ; 2 Privy Council, 515.

These are some of the more recent English cases of those cited by the respondent, and they show that while " it is, gen- " erally speaking, the duty of the master to communicate or to " attempt to communicate with the owner of the cargo," it is not essential that he do so in all cases, even though opportunity for communication exists.

Karnak, Law Rep., 2 Ad. & Ec., 289, p. 309.

Whether the master *must* communicate with the owner depends upon the circumstances. The importance of his communication with the cargo owner is greater in cases where there is a doubt or fair question as to the prudence of binding the cargo. In the cases above cited the Court held, as a fact, that the giving of the bond was so clearly reasonable that it must be deemed that the owners would have consented if communication with them had been had.

In the case of the *Karnak* it was held that, inasmuch as the vessel and freight were of value almost sufficient to meet the bond, the probability of the cargo being called upon to pay any considerable portion of the bond was quite remote, and that no special occasion existed for communication. This conclusion was reached, although the cargo owner urged vehemently that he might have preferred to pay freight and take possession of his cargo, the amount of his freight being only one-half of the amount of the bond for which his cargo was subsequently hypothecated.

The same conclusion was reached in the case of the *Lizzie*, the Court holding that there was neither authority nor improvidence on the part of the master.

In the case of the *Julia Blake,* Chief Justice WAITE after reviewing all English and American cases, relieved the cargo from the bond. In doing so he did not rely merely upon the fact that there was no communication with the owner, but he was influenced to his decision by the circumstances of the case.

There was only £110 freight due to the *Julia Blake* from the cargo and, by paying that amount the owner could have demanded and secured possession of his goods. The cargo had to be entirely discharged at St. Thomas, and the vessel put in dock for repairs and remetalling. She required new masts and sails and extensive repairs to her hull. The repairs amounted to $11,600, though the vessel was worth in New York, after all these repairs, only $4,500.

The Court said :

"It is not only found as a fact that it was for the "interest of the shipper that his property should be "forwarded by some other vessel rather than it should "be hypothecated to pay for the repairs, but every- "thing else in the findings points unmistakably to the "conclusion that such repairs could not have been "effected without an expense to him of very much "more than it would cost to reclaim his property, pay "all lawful charges upon it, and send it forward by some other "conveyance. *Under such circumstances,* we have no hesita- "tion in saying that the master had no authority to pledge the "cargo as he did without the consent of the shipper or con- "signees."

The Julia Blake, 107 U. S., 418, 432.

Applying these rules to the case at bar, it is apparent that there was little occasion to communicate with the owner of the cargo.

The bond was only $12,500 ; the vessel herself was worth $60,000 ; her entire freight was fully $20,000 ; her cargo was worth nearly $100,000.

b. A fatal defect in the respondent's case upon this point is that there is no issue raised by the pleadings as to the matter of communication with the owner of cargo.

Such an omission is purely matter of defense. This is apparent, because the omission, of itself, does not always invalidate the bond, and if it is sought to invalidate the bond

because of the omission to communicate with the cargo-owner, it must be pleaded and established that in the particular case, the omission to make such communication was fatal.

It was so pleaded in the *Julia Blake 16 Blatchf. 472, 492.*

Special pleading was also made in the *Onwrrd (4 Ad. & Ecc. 41)*, the *Lizzie*, the *Karnak*, and in every other case in which we have been able to secure any light from the reports as to the contents of the pleadings.

In this case there is no plea or suggestion in the answer that the bond was invalid for that or any other reason.

It is true that the " respondent denies the matters alleged " in Article Fifth of said libel and complaint except &c, &c " *(Ans. Art 9, p. 12)*, and that one of the allegations of said Article Fifth, thus denied, is

" the libellant, not being fully advised of the circumstances, " and believing that the said bond was properly and neces- " sarily issued, assented " *(Libel, Art. 5, p. 6)*

We submit, however, that such an answer cannot be construed as an averment that there was no communication with the owner of the cargo. It cannot even be construed as a denial that the libellants assented to the bond. At the most, it is a denial that the libellants were misled into assenting to the bond.

The allegation of the libel with the very indefinite answer thereto, must be deemed as establishing that there was, in fact, communication with the owner of the cargo.

Especially is this view correct in connection with the specific admissions that the master borrowed the £2212-5-9 required by him " upon credit of the instrument of bottomry and *respondentia* " *(Ans., Art. 9, p. 12)*.

c. It has never been disputed that communication with the owner of the cargo was in fact made. There has been no occasion therefore to take formal proofs to establish the fact, and it cannot now be argued that, because such proofs have not been taken, the fact did not exist.

d. As to the point now urged by the appellant that the bond is invalid, because the cargo, or that portion of it for-

warded by the *Mary J. Leslie*, was not benefited by the repairs to the *Andrew Johnson*. The question of the relative shares of vessel and cargo for the expenses incurred has been determined by the report of the Commissioner, fixing the principal amount chargeable against the shipowner at $6,091.73, to which report no exception was filed by the respondent *(Decree, fol. 273)*.

Seventh.

THE ACTION IS ONE OF ADMIRALTY JURISDICTION.

It is founded upon the original contract of carriage by which the owner of the *Andrew Johnson* contracted to deliver the cargo at Hamburg, upon payment of freight.

Instead of so doing, he delivered it there subject to the lien of bottomry and *respondentia* and, instead of caring for that lien himself in the first instance, the owner of the cargo has been compelled to pay it to secure possession of his goods.

It is as though the master had jettisoned some of the cargo. The cargo owner would properly seek contribution from the ship owner for the ship owner's contributory share.

Dupont v. Vance, 19 How., 162.
Ins. Co. v. Dunham, 11 Wall. 1.
Heye v. North German Lloyd 33 F. R. 60.
Olivari v. Ins. Co., 37 F. R. 894.
Sweeny v. Thompson, 39 F. R. 121.
Wheaton v. Ins. Co. 39 F. R. 879.
Bowring v. Thebaud, 42 F. R. 520.

The action is brought to recover, not the amount of the bond, but the ship owner's share of the expenses for which the bond was originally given, and which the cargo owner has been compelled, in breach of the contract of carriage, to pay for account of the ship owner.

The respondent was the owner of the *Andrew Johnson* at the time the contract of carriage was made and at the time the expenses were incurred, and is, therefore, the proper party

defendant. There can be no merit in the suggestion that, because the ship owner was partially insured and abandoned the insured interest to his underwriters after the loss of the vessel, the underwriters are, as owners of the vessel, directly responsible to the libellants for any portion of the libellants' claim.

The ship owner who has incurred the responsibility of carrying goods, cannot shift the responsibility by transferring his vessel to another party, especially after a loss has arisen.

Eighth.

THE DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND A MANDATE SHOULD ISSUE TO THE HONORABLE JUDGES OF THAT COURT TO DIRECT THE AFFIRMANCE OF THE DECREE OF THE DISTRICT COURT WITH INTEREST AND COSTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
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WILHELMUS MYNDERSE,
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